Hasnul Hanis bin Badrul (t/a in the name and style of ATS Agency Enterprise) v Allianz General Insurance Co (M) Bhd

HIGH COURT (KUALA LUMPUR) — SUIT NO WA-22NCC-387–09 OF 2017
WONG CHEE LIN JC
14 SEPTEMBER 2018

Contract — Damages — Termination of contract of agency — Plaintiff insurance agent of defendant — Defendant terminated agency agreement — Whether agency agreement could be terminated pursuant to the agreement by giving 14 working days' written notice and without having to assign any reason therefore — When plaintiff first had notice of notice to terminate — Effective date of termination — Whether agency agreement wrongfully terminated — Whether plaintiff entitled to loss of commission, loss of reputation, loss of opportunity, loss of future earnings, aggravated damages and exemplary damages

The plaintiff was, at the material time, the insurance agent of the defendant pursuant to an agency agreement ('the agreement') entered between both the parties. Vide a notice dated 1 April 2016 ('the said notice'), the plaintiff's agency was terminated but the defendant had no proof of service of the said notice. Hence, the defendant admitted liability for wrongful termination of the agreement. The trial therefore proceeded only as to quantum of damages payable to the plaintiff. The plaintiff in the present action claimed compensatory damages, aggravated damages and exemplary damages. The issues for consideration were: (a) whether the agreement could be terminated as provided in cl 12.2 of the agreement, by giving 14 working days' written notice and without having to assign any reason therefor; and (b) when the plaintiff first had notice of the said notice because the effective date of termination of the agency would be 14 days from that date. It ought to be noted that on the issue of costs, after the judgment was pronounced, the counsel for the defendant had informed the court that it had, on 2 February 2018 made an offer to settle to the plaintiff pursuant to the provision of O 22B r 1 of the Rules of Court 2012 ('the ROC'), offering the plaintiff a sum which was in excess of the damages awarded by the court herein.

Held:

(1) The case of *Ang Beng Choo v RHB Insurance Berhad* [2013] 1 LNS 382 was the authority for the proposition that pursuant to cl 12.2 of the agreement, the defendant may terminate the plaintiff's agency validly by giving 14 days' notice without having to assign any reason therefor. Section 158 of the Contracts Act 1950 ('the Act') requiring the sufficient

cause for termination only applicable to agencies where there was an express or implied contract that the agency should be continued for any period of time. In the present case, the agency was not expressed to be for any specific period of time and therefore, s 158 of the Act was not applicable. Section 159 of the Act was related to s 158 and since s 158 was not applicable, s 159 was also not applicable (see paras 22 & 27).

(2) As the plaintiff admitted receiving the said notice on 5 May 2016, the termination of his agency would rightfully and validly take place 14 working days after 5 May 2016 ie on 25 May 2016 (see paras 33–34).

(3) Since lability had been admitted by the defendant, there should be a declaratory order that the agreement had been wrongfully terminated. The court therefore grant a declaratory order that the agreement was wrongfully terminated (see paras 36 & 71).

(4) The court adopted the first mode of calculation as suggested by the defendant to calculate the loss of commission suffered by the plaintiff for the 55 days from 1 April–25 May 2016. The first mode was based on the average increase in the percentage on the annual commission earned by the plaintiff whereas the second mode was to take the highest sum of commission for one complete year as a yardstick in assessing damages for loss of commission. The court adopted the first mode because it would more realistically measure the loss of the plaintiff and it also resulted in a higher figure than the second mode. The court found that the plaintiff was only entitled to loss of commission amounting to RM11,804.42 and that all the other heads of damages claimed by the plaintiff should be dismissed as they were not claimable (see paras 44–45, 47 & 70).

(5) In respect of the other heads of damages, the court found that: (a) the plaintiff was not entitled to damages for loss of reputation as a result of a breach of the agreement; and in any event, the plaintiff had failed to adduce any evidence to support his claim for loss of reputation; (b) the plaintiff had also failed to adduce any evidence to support his claim for loss of opportunity and future earnings; (c) the plaintiff was not entitled to aggravated damages which were to compensate for injury to the plaintiff's pride and feeling; and (d) the plaintiff was not entitled to exemplary damages because it was settled law that no exemplary damages would be awarded in a contractual claim (see paras 47, 50, 52–53, 66 & 68).

(6) It was provided in O 22B r 9(2)(b) of the ROC that where an offer to settle made by a defendant is not accepted by the plaintiff and the plaintiff obtains judgment not more favourable than the terms of the offer to settle, the plaintiff is entitled to costs to the date the offer was served, and the defendant is entitled to costs from that date. In the present case, taking into consideration, inter alia, the proportion of costs

which the plaintiff and the defendant would be entitled to under the scale of costs applicable for low court matter, the court awarded costs of RM4,500 in favour of the defendant, subject to allocator (see para 71).

[Bahasa Malaysia summary

Plaintif adalah, pada masa matan, ejen insurans defendan menurut perjanjian agensi ('perjanjian itu') yang dimasuki antara kedua-dua pihak. Melalui notis bertarikh 1 April 2016 ('notis tersebut'), agensi plaintif telah ditamatkan tetapi defendan tiada bukti perkhidmatan tentang notis tersebut. Justeru, defendan mengakui liabiliti kerana penamatan salah perjanjian tersebut. Perbicaraan dengan itu dimulakan hanya untuk kuantum ganti rugi yang kena dibayar kepada plaintif. Plaintif dalam tindakan ini menuntut ganti rugi pampasan, ganti rugi tambahan dan ganti rugi teladan. Isu-isu untuk pertimbangan adalah: (a) sama ada perjanjian tersebut boleh ditamatkan sebagaimana diperuntukkan dalam klausa 12.2 perjanjian tersebut, dengan memberi notis bertulis 14 hari bekerja dan tanpa perlu memberikan apa-apa sebab untuknya; dan (b) bila plaintif mula-mula menyedari tentang notis tersebut kerana tarikh mula kuat kuasa penamatan agensi itu adalah 14 hari dari tarikh tersebut. Ia patut ditekankan bahawa berhubung isu kos, selepas penghakiman disampaikan, peguam bagi pihak defendan telah memberitahu mahkamah bahawa ia telah, pada 2 Februari 2018 membuat tawaran penyelesaian kepada plaintif menurut peruntukan A 22B k 1 Kaedah-Kaedah Mahkamah 2012, dengan menawarkan plaintif suatu jumlah melebihi ganti rugi yang diawardkan oleh mahkamah.

Diputuskan:

(1) Kes *Ang Beng Choo v RHB Insurance Berhad* [2013] 1 LNS 382 adalah autoriti untuk cadangan itu bahawa menurut klausa 12.2 perjanjian tersebut, defendan boleh menamatkan agensi plaintif secara sah dengan memberikan notis 14 hari tanpa perlu memberikan apa-apa sebab. Seksyen 158 Akta Kontrak 1950 ('Akta') menghendaki sebab yang mencukupi untuk penamatan yang hanya boleh terpakai kepada agensi di mana terdapat kontrak nyata atau tersirat bahawa agensi itu patut diteruskan untuk apa-apa tempoh masa. Dalam kes ini, agensi itu tidak dinyatakan mempunyai apa-apa tempoh masa spesifik dan oleh itu, s 158 Akta tidak terpakai. Seksyen 159 Akta adalah berkaitan s 158 dan oleh kerana s 158 tidak terpakai, s 159 juga adalah tidak terpakai (lihat perenggan 22 & 27).

(2) Oleh kerana plaintif mengakui telah menerima notis tersebut pada 5 Mei 2016, penamatan agensinya telah berlaku dengan wajar dan sah 14 hari dari 5 Mei 2016 iaitu pada 25 Mei 2016 (lihat perenggan 33–34).

(3) Oleh kerana liabiliti telah diakui oleh defendan, perlu ada perintah deklarasi bahawa perjanjian tersebut telah salah ditamatkan. Mahkamah

dengan itu memberikan perintah deklarasi bahawa perjanjian itu telah salah ditamatkan (lihat perenggan 36 & 71).

(4) Mahkamah mengguna pakai cara pengiraan sebagaimana dicadangkan oleh defendan untuk mengira kehilangan komisyen yang dialami oleh plaintif untuk 55 hari dari 1 April 2016–25 Mei 2016. Cara pertama adalah berdasarkan peningkatan biasa dalam peratusan ke atas komisyen tahunan yang diperoleh oleh plaintif manakala cara kedua adalah untuk mengambil jumlah komisyen paling tinggi untuk satu tahun penuh sebagai pengukur dalam mentaksir ganti rugi untuk kehilangan komisyen. Mahkamah mengguna pakai cara pertama kerana ia lebih realistik untuk mengukur kehilangan plaintif dan ia juga menghasilkan jumlah yang lebih tinggi daripada cara kedua. Mahkamah mendapati bahawa plaintif hanya berhak kepada kehilangan komisyen berjumlah RM11,804.42 dan bahawa semua tajuk kepala ganti rugi yang dituntut oleh plaintif patut ditolak kerana ia tidak boleh dituntut (lihat perenggan 44–45, 47 & 70).

(5) Berhubung tajuk kepala ganti rugi lain, mahkamah mendapati bahawa; (a) plaintif tidak berhak mendapat ganti rugi untuk kehilangan reputasi akibat pelanggaran perjanjian tersebut; dan dalam apa keadaan, plaintif telah gagal mengemukakan apa-apa keterangan bagi menyokong tuntutannya untuk kehilangan reputasi; (b) plaintif juga gagal mengemukakan apa-apa keterangan bagi menyokong tuntutannya untuk kehilangan peluang dan pendapatan masa hadapan; (c) plaintif tidak berhak mendapat ganti rugi tambahan sebagai pampasan untuk maruah dan perasaan plaintif yang terjejas; dan (d) plaintif tidak berhak mendapat ganti rugi teladan kerana ia adalah undang-undang lapuk bahawa ganti rugi teladan akan diawardkan dalam tuntutan kontraktual (lihat perenggan 47, 50, 52–53, 66 & 68).

(6) Ia diperuntukkan dalam A 22B k 9(2)(b) KKM bahawa di mana tawaran untuk penyelesaian dibuat oleh defendan tidak diterima oleh plaintif dan plaintif memperoleh penghakiman yang tidak menyebelahi terma tawaran penyelesaian itu, plaintif berhak mendapat kos dari tarikh tawaran itu disampaikan, dan defendan berhak terhadap kos dari tarikh tersebut. Dalam kes ini, setelah dipertimbangkan, antara lain, kos sesuai yang berhak diperoleh plaintif dan defendan di bawah skala kos yang terpakai untuk perkara mahkamah bawahan, mahkamah mengawardkan kos RM4,500 menyebelahi defendan, tertakluk kepada alokatur (lihat perenggan 71).]

Notes

For a case on termination of contract of agency, see 7(2) *Mallal's Digest* (5th Ed, 2018 Reissue) paras 5161.

Cases referred to

American International Assurance Co Ltd v Koh Yen Bee (F) [2002] 4 MLJ 301; [2002] 4 CLJ 49, CA (not folld)
Ang Beng Choo v RHB Insurance Berhad [2013] 1 LNS 382, HC (folld)
Aston Villa Sdn Bhd v Infra Segi Sdn Bhd and another case [2018] 11 MLJ 165, HC (refd)
Bingham-Carter v Hyde Part Hotel Ltd (1948) 64 TLR 177 (refd)
Che Melan Awaludin v Syarikat Takaful Malaysia Berhad [2014] 1 LNS 706, HC (refd)
Cheong Fatt Tze Mansion Sdn Bhd v Hotel Continental Sdn Bhd (Hong Hing Thai Enterprise Sdn Bhd, third party) [2011] 4 MLJ 354, HC (refd)
Datuk Seri Utama Dr Rais bin Yatim v Amizudin bin Ahmat [2012] 2 MLJ 807, HC (refd)
Koh Yen Bee v American International Assurance Co Ltd [2000] 7 MLJ 278; [2000] 3 CLJ 28, HC (not folld)
Malaysian Rubber Development Corp Bhd v Glove Seal Sdn Bhd [1994] 3 MLJ 569, SC (refd)
Milicent Rosalind Danker & Percetion Management International Limited v Malaysia-Europe Forum Berhad, Natasha Zulkifli & Anor [2011] MLJU 452; [2012] 2 CLJ 1076, HC (refd)
Rookes v Barnard and others [1964] AC 1129, HL (refd)
Tan Sri Khoo Teck Puat & Anor v Plenitude Holdings Sdn Bhd [1994] 3 MLJ 777; [1995] 1 CLJ 15, FC (refd)
Watts and another v Morrow [1991] 1 WLR 1421, CA (refd)
Wong Pa Hock v American International Assurance Company Limited & Anor [2001] MLJU 688; [2002] 2 CLJ 267, HC (refd)

Legislation referred to

Contracts Act 1950 ss 74, 158, 159
Rules of Court 2012 O 22B rr 1, 9(2)(b)

Aini Suraya bt Mohd Saifuddin (Yusfarizal Aziz & Zaid) for the plaintiff.
Tan Keng Teck (Foo Siew Yin with him) (Lim Kian Leong & Co) for the defendant.

Wong Chee Lin JC:

[1] The plaintiff has filed this claim against the defendant for damages as a consequence of the wrongful termination of his agency agreement with the defendant insurance company. After a full trial wherein liability had been admitted by the defendant, I have awarded damages against the defendant in the sum of RM11,804.42. These are the full reasons for my decision.

[2] During the trial, two witnesses from the plaintiff and one witness from

the defendant testified. Their evidence-in-chief were given primarily in the form of witness statements:

NO	NAME	WITNESS	WITNESS STATEMENT
1	Hasnul Hanis bin Badrul	PW1	WS/PW1
2	Ari Raus bin Md Raus	PW2	WS/PW2
3	Khoi Kean Siang	DW1	WS/DW1

[3] The bundles of documents and cause papers filed for the trial purposes are as follows:

(a) *ikatan pliding* — IP;

(b) *ikatan dokumen bersama* (*Bahagian* B) — CBD1;

(c) statement of agreed facts — Document A;

(d) supplemental statement of agreed facts — Document A1;

(e) statement of issues to be tried — Document B;

(f) the plaintiff's case summary — Document C;

(g) the defendant's case summary — Document D; and

(h) summary of the plaintiff's statement of account (pp 53–327 of bundle of documents) — Document D1.

SALIENT BACKGROUND FACTS

[4] At the material time, the plaintiff was the insurance agent of the defendant, having entered into an agency agreement dated 19 July 2012 with the defendant.

[5] On 1 April 2016, the defendant sent a 14 working days' written notice to terminate the agency agreement pursuant to cl 12.2 of the agency agreement. The plaintiff found out that his agency has been terminated with effect from 1 April 2016. However, the defendant has no proof of service of the notice dated 1 April 2016 and accordingly admitted liability for wrongful termination of the agency agreement. The trial proceeded only as to quantum of damages payable to the plaintiff.

[6] Under the agency agreement, the agency agreement may be terminated under either cl 12.1 or 12.2.

[7] It is clear and certain from the notice of termination that the defendant had terminated the agency agreement under cl 12.2. Paragraph 2 of the notice

of termination states as follows:

> Pursuant to Clause 12.2 of the Agreement, we hereby give you fourteen (14) working days written notice to terminate the Agreement. The termination would be effective from 21st April 2016.

[8] When the plaintiff found out that his agency has been terminated by the defendant, he wrote to the defendant for further particulars and there was a series of correspondence between the parties. Initially the defendant responded to say that the termination was upon the request of the plaintiff himself but later on the defendant took the position that the termination was pursuant to cl 12.2 of the agency agreement which does not require any reason to be stipulated for the termination.

[9] Clause 12.2 of the agency agreement reads as follows:

> 12.2 Without prejudice to the Company's right of termination under Clause 12.1 hereof either party hereto shall be entitled to determine the agency herein by giving the other fourteen (14) working days written notice or such other period of notice as may be agreed upon.

[10] The wordings of 'working days' are defined under cl 21.1.5 of the agency agreement. It reads as follows:

> 21.1.5 the expression 'working days' shall mean the days on which the Company is open for the business in the respective areas/states.

[11] The plaintiff was an agent of the defendant at Klang Branch, Selangor at all material times.

[12] By letter to the plaintiff dated 4 May 2016, the defendant again explained to the plaintiff that the termination of his agency was pursuant to cl 12.2 of the agency agreement:

> 2. As regards items 4, 5 and 6 in your Latest Letter, we would like to clarify that your Agency was terminated pursuant to Clause 12.2 of the Agency Agreement which allows either party to terminate the agency thereunder by giving 14 working days' written notice. It appears from the contents of your Latest Letter that you did not receive our notice of termination dated 1 April 2016, a copy thereof attached herewith for your reference.

[13] On 5 May 2016, the defendant again emailed the notice of termination dated 1 April 2016 to the plaintiff.

[14] The said email is reproduced below:

> From : Shashi Kala Suppiah

Sent : Thursday, May 05, 2016 4:27 PM

To : 'hasnulhanis82@gmail.com'

Cc : Manogari S Murugiah; Muralitharan Poobalan; Francis Tan Chin Foo; Kevin Lim Khai Weng

Subject : FW: ATS Agency Enterprise-KG07367

Dear En Hasnul,

Pursuant to your letter's dated 9th & 24th April 2016, we hereby confirmed that the notice of termination was issued to your goodself on the 1st April 2016 and was mail to your correspondent address.

Since you did not receive the said notice from us, we attached herewith the respond letter & a copy of the Termination Notice for your attention. We will mail out same to you.

Thank you.

Shahshi Kala Suppiah

Branch Operations & Policy Mgmt/Allianz General Insurance Malaysia Berhad

Level 22, Menara Allianz Sentral

Kuala Lumpur Sentral, 50470 Kuala Lumpur

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[15] The plaintiff admitted that he had received a copy of the notice of termination dated 1 April 2016 on 12 May 2016.

[16] The defendant adduced proof of the commission the plaintiff received from the defendant. That was agreed in the agreed facts. The plaintiff adduced copies of his bank statements which he said comprise his earnings from all his various activities he was carrying on, in addition to that of selling insurance. The said bank statements are of no relevance as evidence of loss as there is no segregation between what the plaintiff was earning as an insurance agent and what he was earning from his other activities.

[17] The plaintiff claims compensatory damages, aggravated damages and exemplary damages.

FINDINGS OF THE COURT

[18] The first issue I have to determine is whether the agency agreement can be terminated as provided in cl 12.2, by giving 14 working days' written notice and without having to assign any reason therefor.

[19] In the case of *Ang Beng Choo v RHB Insurance Berhad* [2013] 1 LNS 382, the court had construed cl 12.2 of the impugned agency agreement

therein which reads as follows:

> 12.2 Without prejudice to the Company's right of termination under clause 12.1 hereof either party hereto shall be entitled to determine the agency herein by giving to the other fourteen (14) working days written notice (or such other period of notice as may be agreed upon).

[20] The High Court in construing and interpreting the cl 12.2 in the case of *Ang Beng Choo* said this at p 14:

> The termination under cl 12.1 is forthwith. The ground of 'unfavourable claims experience' is not found in cl 12.1. The other clause is cl 12.2. This clause may be invoked by either the agent or the Insurance Company. No reason is required to be given for such a termination by either one giving the other a 14 working day written notice.

[21] The aforesaid cl 12.2 in the case of *Ang Beng Choo* is similar to the cl 12.2 of the agency agreement herein.

[22] Accordingly, this case is authority for the proposition that pursuant to cl 12.2 of the agency agreement, the defendant may terminate the plaintiff's agency validly by giving 14 working days' notice without having to assign any reason therefor.

[23] On the other hand, the plaintiff relied on another High Court decision, that of *Koh Yen Bee v American International Assurance Co Ltd* [2000] 7 MLJ 278; [2000] 3 CLJ 28 where there was a similar provision in the agency agreement of the plaintiff agent and the defendant insurance company (cl 26(b)) but the High Court judge held that the defendant had to prove that the termination of the agency was justified, in good faith and was in accordance to law and with natural justice and sufficient cause and with reasonable notice. The court in that case held that the termination of the agent was wrongful and awarded substantial damages in the sum of RM3m in favour of the plaintiff.

[24] In the *Koh Yen Bee* case, the High Court judge had found that the provision relied upon by the defendant to terminate the agency had since been varied or modified by the addendum to the agent's contract. The court also held that the defendant was estopped and barred from relying on the clause in question for terminating the agency. The court in *Koh Yen Bee* held that the clause entitling the defendant to terminate the agency by giving 15 day's notice in writing and without specifying any reason is void as it is inconsistent with ss 158 and 159 of the Contracts Act 1950.

[25] Sections 158 and 159 of the Contracts Act provide as follows:

> Where there is an express or implied contract that the agency should be continued for any period of time, the principal must make compensation to the agent, or the agent to the principal, as the case may be, for any previous revocation or renunciation of the agency without sufficient cause.
>
> Reasonable notice must be given of such revocation or renunciation; otherwise the damage thereby resulting to the principal or the agent, as the case may be, must be made good to the one by the other.

[26] The court in *Koh Yen Bee* held that cl 26(b) of the agent's contract in that case which does not require the giving of any reason for the termination of the agent's contract is inconsistent with s 158 of the Contracts Act which requires sufficient cause for revocation or renunciation of the agency. Furthermore, the court there held that cl 16(b) which requires the giving of only 15 days' notice in writing is also inconsistent with s 159 which specifically mandates the giving of reasonable notice.

[27] In my opinion, s 158 of the Contracts Act requiring the sufficient cause for termination only applies to agencies where there is an express or implied contract that the agency should be continued for any period of time. In the present case, the agency is not expressed to be for any specific period of time and so s 158 of the Contracts Act is not applicable. Section 159 is related to s 158 and since s 158 is not applicable, s 159 is also not applicable.

[28] As a matter of fact, the case relied on by learned counsel for the plaintiff, the *Koh Yen Bee* case has been overruled by the Court of Appeal which found in favour of the insurance company and held that the termination of the agency was valid and that cl 26(b) in that case was valid based on the same reasons as I had set out above (see *American International Assurance Co Ltd v Koh Yen Bee (F)* [2002] 4 MLJ 301; [2002] 4 CLJ 49). Learned counsel should have checked out his cases before relying on them to see if they have been overruled as that might tend to mislead the court. Accordingly, the High Court decision in *Koh Yen Bee* is not good law. I would accordingly rely on the case of *Ang Beng Choo.*

[29] The next issue I have to decide is when the plaintiff first had notice of the notice of termination dated 1 April 2016 because the effective date of termination of the agency will be 14 working days from that date.

[30] The plaintiff admitted that he had received the defendant's letter dated 4 May 2016 but said he was not sure that he received it on that day itself. The important point to note is that the notice of termination was attached with the letter dated 4 May 2016.

[31] This is what the plaintiff said in his testimony:

FSY : Bolehkah anda mengesahkan bahawa anda telah menerima surat 4.5.2016 bersama dengan notis yang dilampirkan di situ pada 4.5.2016?

Hasnul : Saya tidak pasti.

FSY : Tetapi adakah surat dan notis tersebut dalam rekod Encik?

Hasnul : Ya.

[32] As the plaintiff did not say for certain that he had received the notice of termination dated 1 April 2016 on 4 May 2016, I will not deem that he had received it on that day.

[33] As for the email dated 5 May 2016 which attached a copy of the notice of termination dated 1 April 2016, the plaintiff had admitted that he received it on 5 May 2016. This is what he says in testimony:

FSY : Sekarang saya merujuk kepada muka surat 47. Ini adalah emel daripada Defendan, Allianz, kepada En. Hasnul. Tapi yang saya hendak merujuk adalah di bawah. From Shashi Kasupia. Sent Thursday 05.05.2016 to hasnulhanis82. Subject: forward ATS Agency Enterprise. Adakah alamat emel tersebut adalah alamat En. Hasnul?

Hasnul : Ya

FSY : Oleh sebab emel ini dengan notis ini adalah dihantar secara emel, jadi En. Hasmul akan menerima email dan surat dalam emel itu pada 05.05.2016.

Hasnul : Ya, setuju.

[34] As the plaintiff admitted receiving the notice of termination dated 1 April 2016 on 5 May 2016, the termination of his agency will rightfully and validly take place 14 working days after 5 May 2016 ie on 25 May 2016.

[35] I will now deal with the claims made by the plaintiff. The plaintiff made the following claims:

(a) a declaratory order that the agency agreement had been wrongfully terminated;

(b) general damages for loss of profits and income, loss of reputation and loss of future earning caused by the wrongful termination;

(c) aggravated damages; and

(d) exemplary damages.

[36] Since liability has been admitted, it goes without saying that there should be a declaratory order that the agency agreement has been wrongfully terminated.

[37] As for damages, they should not be awarded simply because the plaintiff has pleaded them. He who asserts must prove. The plaintiff must prove that he is entitled to damages and/or losses he claimed.

[38] The above position was emphasised by the Federal Court in the case of *Tan Sri Khoo Teck Puat & Anor v Plenitude Holdings Sdn Bhd* [1994] 3 MLJ 777 at p 784; [1995] 1 CLJ 15 at p 20 and the Federal Court further quoted the well known dictum of Lord Goddard LCJ in *Bingham-Carter v Hyde Part Hotel Ltd* (1948) 64 TLR 177 where His Lordship said that:

> ... plaintiffs must understand that if they bring actions for damages it is for them to prove their damage; it is not enough to write down the particulars, so to speak, throw them at the head of the Court, saying: 'This is what I have lost, I ask you to give me these damages'. They have to prove it.

[39] In the present case, the plaintiff is claiming for damages and/or losses arose from breach of the agency agreement. Therefore, the plaintiff must prove that he is entitled to recover the damages and/or loss that falls within s 74 of the Contracts Act 1950:

> Section 74 Compensation for loss or damage caused by breach of contract
>
> (1) When a contract has been broken, the party who suffers by the breach is entitled to receive, from the party who has broken the contract, compensation for any loss or damage caused to him thereby, which naturally arose in the usual course of things from the breach, or which the parties knew, when they made the contract, to be likely to result from the breach of it.
>
> (2) Such compensation is not to be given for any remote and indirect loss or damage sustained by reason of the breach.
>
> Compensation for failure to discharge obligation resembling those created by contract.
>
> (3) When an obligation resembling those created by contract has been incurred and has not been discharged, any person injured by the failure to discharge it is entitled to receive the same compensation from the party in default as if the person had contracted to discharge it and had broken his contract.
>
> Explanation — In estimating the loss or damage arising from a breach of contract, the means which existed of remedying the inconvenience caused by the non-performance of the contract must be taken into account.

[40] Reference may be made to the Supreme Court case of *Malaysian Rubber Development Corp Bhd v Glove Seal Sdn Bhd* [1994] 3 MLJ 569 in which Mohamed Dzaiddin SCJ at p 575 held that:

> In considering the above question, it is important to bear in mind that the normal measure of damages for breach of contract in this country is prescribed by s 74(1) of the Contracts Act 1950, which is the statutory enunciation of *Hadley v Baxendale* (1854) 9 Ex 341(*Teoh Kee Keong v Tambun Mining Co Ltd* [1968] 1 MLJ 39; *Bank*

Bumiputra Malaysia Bhd Kuala Terengganu v Mae Perkayuan Sdn Bhd & Ors [1993] 2 MLJ 76 (SC). In essence, the section states that the party may recover any loss or damage for any breach which; (a) naturally arose in the usual course of things; or (b) which the parties knew, when they made the contract, to be likely to result from the breach of it. For the sake of completeness, it should be mentioned that our courts have treated the position under the second limb of the section to be similar to the second limb of Hadley v Baxendale, which is, the party may recover damages which may 'reasonably be supposed to have been in contemplation of both the parties, at the time they made the contract': See *Associated Metal Smelters Ltd v Tham Cheow Toh* [1971] 1 MLJ 271.

[41] In the case of *Ang Beng Choo v RHB Insurance Berhad* [2013] 1 LNS 382, the court in holding that RHB Insurance Bank had wrongfully terminated the agency agreement with the plaintiff, had allowed damages to be assessed for loss of income only. Lee Swee Seng J at p 42 pronounced as follows:

> To recapitulate, I had allowed a declaration that the termination of the agency agreement is unlawful, invalid and unreasonable.
>
> Based on the evidence adduced, I would only allow damages to be assessed for loss of income before the Senior Assistant Registrar. I would disallow the other heads of damages as this is merely a case of a wrongful termination of a contract arising more from not taking proper advice ...
>
> All the other heads of claims including aggravated and exemplary damages are dismissed.

[42] Likewise in the case of *Che Melan Awaludin v Syarikat Takaful Malaysia Berhad* [2014] 1 LNS 706, the Kuala Lumpur High Court in holding that Sykt Takaful Malaysia Bhd's termination of the agency agreement with the plaintiff was unlawful and invalid had allowed the claim for overriding commission and dismissed the claim for aggravated and exemplary damages.

[43] The plaintiff's loss of commission should be based on the plaintiff's commission record for the years 2012–2017 at para 3 of the statement of agreed facts as follows:

NO	YEAR	TOTAL COMMISSION (RM)
1	2012	3,798
2	2013	20,613
3	2014	28,704
4	2015	49,991
5	2016	17,132
6	2017	367

[44] The defendant has suggested two different modes of calculation of the loss of commission suffered by the plaintiff for the 55 days from 1 April 2016–25 May 2016 (effective date of termination). A

[45] One mode is based on the average increase in the percentage on the annual commission earned by the plaintiff and the other mode is to take the highest sum of commission for one complete year as a yardstick in assessing damages for his loss of commission. As the first mode would more realistically measure the loss of the plaintiff and it also results in a higher figure than the second mode, I shall adopt the first mode of computing the loss of commission suffered by the plaintiff based on the commission record he had earned from the defendant for the years 2012–2017. B C

[46] The computation is set out below: D

1. From year 2013 to 2014, there is an increase of 39.25% on the Total Commission earned by the plaintiff, the calculations of which are as follows: E

Difference of Commission between Year 2013 and 2014 (RM28,704.00–RM20,613.00)	RM8,091.00
Increase in the percentage in The Total Commission between Year 2013 and 2014 (RM8,091.00/RM20,613.00) x 100%	39.25%

F

2. From year 2014 to 2015, there is an increase of 74.16% on the Total Commission earned by the plaintiff, the calculations of which are as follows: G

Difference of Commission between Year 2014 and 2015 (RM49,991.00–RM28,704.00)	RM21,287.00
Increase in the percentage in The Total Commission between Year 2014 and 2015 (RM21,287091.00/RM28,704.00) x 100%	74.165%

H

Following from the above, there would be an average increase of 56.705% on the sum of RM49,991.00 for the Total Commission in year 2016, amounting to the sum of *RM78,338.40*, the calculations of which are as follows: I

Average Increase of Percentage in year 2016 (74.16% + 39.25%/2)	56.705%

Anticipated Total Commission in Year 2016 Taking into account an average increase in percentage on Total Commission from 2013 to 2015	
(RM49,991.00 x 1.56705)	RM78,338.40

For the date of termination from 1.4.2016 to 25.5.2016 i.e 55 days, the Plaintiff may recover *RM11,804.42*, the calculations of which are as follows:

RM78,338.40 x 55 days/365 days = RM11,804.42

[47] I am of the view that all the other heads of damages claimed by the plaintiff should be dismissed as they are not claimable. Firstly, the plaintiff is not entitled to damages for loss of reputation as a result of a breach of the agency agreement.

[48] With regard to this, Harmindar Singh Dhaliwal JC (as His Lordship then was) in the case of *Milicent Rosalind Danker & Percetion Management International Limited v Malaysia-Europe Forum Berhad, Natasha Zulkifli & Anor* [2011] MLJU 452; [2012] 2 CLJ 1076 at p 1092 had this to say:

> [50] It is also trite law that damages for loss of reputation are not recoverable in an action founded on breach of contract except in three well-known cases, namely, actions against a banker for refusing to pay a customer's cheque when he has in his hands funds to meet it, actions for breach of promise to marry, and actions where the vendor of real estate, without any fault on his part, fails to make title (*Addis Gramophone Co Ltd* [1909] AC 488 and followed in *Kapt (B) Hj Mohamad Ismail v Perwira Affin Bank Bhd (No 2)* [2001] 5 CLJ 184). It was suggested in *CCA Holdings Ltd v Palm Resort Bhd* [1998] 4 CLJ 440 that there may be other exceptions.
>
> [51] Whatever may be the position, any such claim will have to pass the remoteness rule in s 74 of the Contracts Act 1950 which I had referred to earlier. I do not think it can be said with any firm degree of conviction that the parties contemplated loss of reputation as arising from the breach of the contract. That sort of damage is far too remote. I would therefore surmise that damages for loss of reputation generally cannot be claimed except in actions for defamation. If the plaintiffs were really serious about claiming damages for loss of reputation and for injured feelings, they ought to have filed a claim for defamation instead of proceeding in the fashion that they did. No damages are therefore allowable in this regard.

[49] The case of *Milicent Rosalind Danker & Percetion Management International Limited v Malaysia-Europe Forum Berhad, Natasha Zulkifli & Anor* had recently been referred to by Lee Swee Seng J in the case of *Aston Villa Sdn Bhd v Infra Segi Sdn Bhd and another case* [2018] 11 MLJ 165 at p 183.

[50] In any event, the plaintiff has failed to adduce any evidence to support

his claim for loss of reputation. At trial, the plaintiff testified that:

> TKT : Apakah bukti yang anda akan berikan kepada mahkamah ini berkenaan kecederaan reputasi? Tak ada bukti kan?
>
> Hasnul : Tiada.

[51] The plaintiff relied on the case of *Datuk Seri Utama Dr Rais bin Yatim v Amizudin bin Ahmat* [2012] 2 MLJ 807 to contend that he is entitled to damages for loss of reputation. However, that is a case in the tort of defamation, not for breach of contract.

[52] The plaintiff has also not adduced any proof to justify him being awarded any damages for loss of opportunity and future earning.

[53] The plaintiff is not entitled to aggravated damages which are to compensate for injury to the plaintiff's pride or feeling.

[54] Reference should be made to the case of *Cheong Fatt Tze Mansion Sdn Bhd v Hotel Continental Sdn Bhd (Hong Hing Thai Enterprise Sdn Bhd, third party)* [2011] 4 MLJ 354 in which the High Court at p 382 held:

> [45] Aggravated damages. In the *Law of Tort* (9th Ed) 2009 by Professor John Cooke, the learned author said that aggravated damages are awarded where there is outrage to person or property and are best regarded as compensatory. They are to compensate for injury to the claimant's pride or feelings'. In *Mc Gregor on Damages* (15th Ed) 1988 pp 409–410, aggravated damage is said to be:
>
> > ... aggravated damage — that is, as cases of extra compensation to the plaintiff for the injury to his feelings and dignity
>
> [47] It is clear thus that aggravated damage is awarded as a form of a higher compensation to show the disapproval of the acts of a defendant which were carried out in such a manner that the plaintiff has suffered more than would normally be expected in such a case. (*Tort Law* by Catherine Elliot and Frances Quinn (7th Ed) 2009). And such damage is to compensate the plaintiff an extra sum for the injury to his feelings and pride or dignity ...

[55] The position of law is clear that unless the very object of a contract is to provide pleasure, relaxation, peace of mind or freedom from molestation, aggravated damages are generally not awarded for a breach of contract.

[56] The above principle is enunciated in *Watts and another v Morrow* [1991] 1 WLR 1421 whereas Bingham LJ at p 1445 held:

> A contract-breaker is not in general liable for any distress, frustration, anxiety, displeasure, vexation, tension or aggravation which his breach of contract may cause

> to the innocent party. This rule is not, I think, founded on the assumption that such reactions are not foreseeable, which they surely are or may be, but on considerations of policy.
>
> Where the very object of a contract is to provide pleasure, relaxation, peace of mind or freedom from molestation, damages will be awarded if the fruit of the contract is not provided or if the contrary result is procured instead. If the law did not cater for this exceptional category of case it would be defective. A contract to survey the condition of a house for a prospective purchaser does not, however, fall within this exceptional category.

[57] The case of *Watts v Morrow* was referred in *Ang Beng Choo v RHB Insurance Berhad* [2013] 1 LNS 382 and the High Court in dismissing the plaintiff's claim for aggravated damages said at p 38 that the aforesaid exceptions do not apply in the case for a breach of an agency agreement.

[58] The plaintiff submitted that he is entitled to aggravated damages as there if a breach of natural justice by the defendant during the termination process.

[59] To justify his claim for aggravated damages, the plaintiff claimed that he was a 'diligent, dedicated and an effective insurance agent' who had 'excellent performance and good reputation' in the insurance industry with 'no bad record during his employment' and the termination under cl 12.2 showed the defendant's 'insensitive and blatantly disregard' to the plaintiff's loyalty.

[60] The plaintiff further submitted that any reasonable man would want to know the reasons for the termination and since the defendant did not give any, it constitutes a breach of natural justice.

[61] Again, the plaintiff had relied on the High Court decision in the case of *Koh Yen Bee*, the decision of which had been reversed by the Court of Appeal, to support the above proposition.

[62] The Court of Appeal in the case of *Koh Yen Bee* had aptly held at p 314 that the issue of fair hearing should not arise in the case for a termination of an agency agreement:

> In any event, the question of giving a fair hearing does not arise at all in this case. As submitted by the learned counsel for the appellant, and we agree with him, this is a case of and concerning the exercise of private law rights under a private contract. It does not concern a public body acting pursuant to powers derived from an Act of Parliament. The relationship between the appellant and the respondent was purely a contractual relationship, not that of an employer and an employee. Clause 32 clearly provides so.

[63] It is submitted by the plaintiff that 'although cl 12(2) does not require the defendant to give reason', it seriously constitutes breach of natural justice.

[64] I am of the view that there is no basis for the plaintiff's submission. The parties had agreed in cl 12(2) of the agency agreement that either party may terminate the agreement by giving 14 working days' notice. Obviously there is no need to assign any reason for the termination. In the case of *Wong Pa Hock v American International Assurance Company Limited & Anor* [2001] MLJU 688; [2002] 2 CLJ 267, the High Court held as follows:

> The plaintiff complains that the contract has been unjustly terminated and that injustice has arisen because the first defendant has not given him any reasons for the termination nor afforded him an opportunity to be heard before his agency was terminated. While I accept the general principles relating to the rules of natural justice and the varied circumstances in which they have been applied, whether in a particular instance the rules will apply must be decided on its own particular facts and in this case, the parties have already agreed to what they are. I have earlier stated them. The context, therefore, in which the plaintiff seeks to avail himself to the rules of natural justice is a contractual one. To be precise, a contract of agency of which cl 24(b) gives either party the unilateral right to terminate the contract upon 15 days' notice in writing without the need to assign any reasons therefore.
>
> ...
>
> Reverting to the agreed facts of this case, in entering into the contract in question, the plaintiff and the first defendant had very obviously addressed their minds to the question of how their relationship could be brought to an end and this has found expression in the clear and unequivocal words of cl 24(b). Can it then be said by the plaintiff that the first defendant's decision to exercise its rights in accordance with the terms of the contract is unjust because in exercising its contractual right, the first defendant has not given him the reasons for doing so or an opportunity to be heard? That question must, in my opinion, be answered in the negative. This is not a case of dismissal of an employee. It is of termination of a contract of agency. As I had said earlier, the parties had addressed their minds to the question of termination and if it had been intended that reasons would need to be given or that there should be procedural safeguards for termination, they would have expressed cl 24(b) differently.
>
> I do not think it is permissible for the court in the face of the clear and unequivocal words of cl 24(b) to interpose on the parties the procedural safeguards that the plaintiff now seeks to invoke. To do so would amount to the court rewriting the contract for the parties. In my judgment, the court should decline to do so and instead hold the parties to the contract they have made for themselves by giving effect to the clear terms of cl 24(b).

[65] Accordingly, I reiterate that the plaintiff is not entitled to aggravated damages.

[66] Finally, the plaintiff is also not entitled to exemplary damages.

[67] The leading case on the subject is *Rookes v Barnard and others* [1964] AC 1129 whereas it established three categories under which exemplary damages can be awarded:

(a) where there is oppressive, arbitrary or unconstitutional action by a government servant;

(b) if the conduct of the defendant is calculated by him to make a profit for himself which may well exceed the compensation payable to the plaintiffs; and

(c) where exemplary damages are authorised by statute.

[68] It is settled law that no exemplary damages will be awarded in a contractual claim. *Rooks v Barnard* is a claim in tort.

[69] The High Court in *Ang Beng Choo v RHB Insurance Berhad* had, inter alia, referred and cited the following line of authorities in dismissing the plaintiff's claim for exemplary damages in an action for breach of an agency agreement:

(a) *Mcgregor on Damages* (18th Ed) (at pp 38–39):

> For contract, on the other hand, the position is less certain. Historically, the law has always set its face against awarding exemplary damages for breach of contract; outrageous conduct is the domain of tort rather than contract.

(b) Visu Sinnadurai in the *Law of Contract* (3rd Ed) (at pp 39–40):

> It is only in extremely rare cases that the courts grant exemplary damages. This type of damages if granted is usually to punish the defendant. Under English law, the only category of contracts in which such damages had been granted were in actions for breach of promise of marriage. But since the abolition of such actions in 1970 by the Law Reform (Miscellaneous Provisions) Act 1970, it would appear that exemplary damages will no longer be granted by the English courts for any action for breach of contract. Since the decision of the House of Lords in *Rookes v Barnard*, even the award of such damages in tort is now restricted.

[70] In conclusion, the plaintiff is only entitled to loss of commission in the sum of RM11,804.42 for loss of commission for the 55 days between the date when his agency was purportedly terminated to the date when it was rightfully and validly terminated.

[71] I accordingly grant a declaratory order that the agency agreement was wrongfully terminated and the plaintiff was entitled to damages in the sum of RM11,804,42 only. On the issue of costs, after judgment was pronounced, learned counsel for the defendant informed the court that it had, on 2 February

2018 made an offer to settle to the plaintiff pursuant to the provision of O 22B r 1 of the Rules of Court 2012, offering the plaintiff a sum which was in excess of the damages awarded by the court now. It is provided in O 22B r 9(2)(b) that where an offer to settle made by a defendant is not accepted by the plaintiff and the plaintiff obtains judgment not more favourable than the terms of the offer to settle, the plaintiff is entitled to costs to the date the offer was served, and the defendant is entitled to costs from that date. Taking into consideration, inter alia, the proportion of costs which the plaintiff and the defendant would be entitled to under the scale of costs applicable for low court matter, I award costs of RM4,500 in favour of the defendant, subject to allocator.

Order accordingly.

Reported by Dzulqarnain Ab Fatar